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Attorneys for Plaintiff KAROL WESTERN CORP.

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

**KAROL WESTERN CORP., a California  
Corporation**

**Plaintiff.**

V.

SMITH NEWS COMPANY, INC. a  
California corporation d/b/a SMITH  
NOVELTY COMPANY

**Defendant.**

CASE NO. CV12-7695 BRO (VBKx)

DECLARATION NO. 2 OF BRUCE L.  
ISHIMATSU IN SUPPORT OF  
PLAINTIFF'S OPPOSITION TO  
DEFENDANT'S MOTION IN LIMINE  
NO. 1

Hearing Date: March 3, 2014  
Time: 1:30 p.m.

Dept.: Courtroom 14

Trial Date: March 25, 2014

**DECLARATION OF BRUCE L. ISHIMATSU**

I, BRUCE L. ISHIMATSU, hereby depose and say as follows:

1. I have personal knowledge of the matters set forth in this declaration, and if sworn could and would competently testify thereto.

2. I am counsel of record herein for Plaintiff KAROL WESTERN CORP. ("KWC") and a member in good standing with the State Bar of California and admitted to practice before this Court.

3. Attached hereto as Exhibit "A" is a true and correct copy of "Expert Report and Disclosure of Professor Jeff Sedlik [F.R.C.P Rule 26]" served on Defendant on September 23, 2013 in this action.

I declare under penalty of perjury that the foregoing is true and correct  
(28 U.S. C. § 1746) and has been executed by me in Marina del Rey, California as of  
the date shown above my signature.

DATED: January 31, 2014.

Bruce L. Ishimatsu  
BRUCE L. ISHIMATSU

# **Exhibit “A”**

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Attorneys for Plaintiff **KAROL WESTERN CORP.**

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KAROL WESTERN CORP., a California  
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SMITH NEWS COMPANY, INC. a  
California corporation d/b/a SMITH  
NOVELTY COMPANY

Defendant.

CASE NO. CV12-7695 BRO (VBKx)

EXPERT REPORT AND  
DISCLOSURE OF PROFESSOR JEFF  
SEDLIK [F.R.C.P. Rule 26]

I have been engaged by Plaintiff Karol Western Corporation ("Karol") in the above captioned matter brought by Karol against Defendant Smith News Company, Inc, d/b/a Smith Novelty Company ("Smith"), to provide expert testimony as set forth below.

I have been retained by Karol and its attorneys to (i) opine on the objective similarity between designs appearing on certain products developed and sold by Karol as compared with certain products produced by Smith, and to (ii) opine on the objective similarity between those Smith designs and certain other designs Smith alleges appeared on various Smith products beginning in 2004 and thereafter. More specifically, Karol has requested that I conduct an examination and comparison of two flasks manufactured and sold by, respectively, Karol and Smith, and to extrinsically analyze and opine on the question of substantial similarities between the designs appearing on the respective flasks. Further, I have been retained by Karol to review and opine on assertions, denials, claims or opinions expressed by Smith, its fact witnesses and/or expert witnesses that a November 2011 Smith flask design is, objectively and as a whole, substantially similar to the alleged earlier Smith designs for various products. In particular, Karol has requested that I review and opine on the March 25, 2013 Declaration of Enrico Urbiztondo.<sup>1</sup> I may provide opinions on related topics if requested by Karol.

My opinions are based in part on more than twenty years of service in high-level positions in trade associations and standard-setting bodies in the photography, advertising and design industries. In addition, I have owned and operated a publishing company for more than a decade, and I have been a nationally recognized advertising photographer for more than 28 years, working with many clients, observing and interacting with large numbers of professional photographers, advertising agencies, design firms, corporate clients and others in the United States and other countries.

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<sup>1</sup> Declaration of Enrico Urbiztondo In Support of Defendant's Opposition to Plaintiff's Motion for Partial Summary Judgment, executed March 25, 2013, filed March 26, 2013 ("Urbiztondo Declaration").

In addition to my personal knowledge, my opinions are based on an independent examination of the Urbiztondo Declaration and other documents and materials produced by the parties in this matter. Should additional relevant information come to light, I may amend or supplement my opinions as necessary and permitted by the Court. In addition to supplemental expert reports, I may also offer rebuttal expert reports in response to reports filed at any time by Smith or by experts retained by Smith in this matter.

This Preliminary Expert Report ("the Report") has been prepared in connection with the above referenced matter, and is submitted pursuant to Fed. R. Civ. P. 26(a) (2). Section V of the Report outlines my preliminary opinions.

If called upon as a witness in this matter, I could and would make the following statements of my own personal knowledge and experience.

## **I. QUALIFICATIONS**

I am currently the President and CEO of the PLUS Coalition. "PLUS" is an acronym for "Picture Licensing Universal System." The PLUS Coalition is a non-profit, international standards body and trade association representing the shared business interests of all industries involved in the creation, licensing and use of photography and illustration, including photographers, illustrators, advertisers, advertising agencies, graphic design studios, publishers, artists' representatives, museums, libraries, stock photo agencies and all other image licensees and licensors.

I am the past National President of the Advertising Photographers of America (APA), the leading trade association for commercial photographers in the United States, for which I currently hold the position of Chief National Advisor

on Licensing and Copyright. I currently serve on the Photography Industry Advisory Council for Adobe Systems, a leading software company.

I sit on the Intellectual Property Committee of the Art Center College of Design, where I am an active faculty member, holding the title of Professor of Photography, and where I teach advanced courses on legal, business and technical issues related to the design industries.

After twenty-five years as an award-winning commercial photographer and the President of Jeff Sedlik Photography, I continue to operate an advertising photography production company in California, with a client list that includes such companies as Nike, Federal Express, Farmers Insurance, SBC, GTE, NBC, Sony, AT&T, Blue Cross, Epson, IKEA, MCA, United Airlines, Warner Brothers, Toyota, Nestlé, Disney, Bank of America and others.

I am the President of Mason Editions, a publishing company engaged in producing and distributing products depicting photographs and designs. In addition, I provide consulting services to organizations and individuals on issues related to copyright, licensing, negotiating and business practices and procedures related to photography, advertising, and design.

My qualifications are set forth in more detail in my curriculum vitae, attached as Exhibit A.

I have occasionally testified as an expert witness in litigation involving photography. The cases in which I have testified at trial or by deposition in the last four years are:

Jennifer Leigh Miller v. Anheuser-Busch, Inc.

U.S. District Court, Southern District of Florida, Miami Division

Case #06-021770-ASG

Stereo Optical Co., Inc. v. Thomas J. Judy, Jacqueline K. Judy, Ralph E. Craig, Richard Unger and Vision Assessment Corporation

U.S. District Court, Northern District of Illinois, Eastern Division

Case #08 C 2512

Cathrin Lorentz v. Sunshine Health Products, Inc., a Florida Corporation and Cathie Rhames

U.S. District Court, Southern District of Florida

Case # 09-CIV-61529-Moreno/Torres

Andrew Paul Leonard v. Stemtech Health Sciences, Inc.

U.S. District Court, District of Delaware

Case # 08-67-JJF

Omar Hogben v. Costa Cruise Lines N.V., L.L.C.

Circuit Court, Eleventh Circuit In and For Miami-Dade County, Florida

Case # 08-30730 CA 30

Ivan Chorney v. Costa Cruise Lines N.V., L.L.C.

Circuit Court, Eleventh Circuit In and For Miami-Dade County, Florida

Case # 10-34095 CA 31

Richard Reinsdorf v. Skechers U.S.A, Inc  
U.S. District Court, Central District of California  
Case # CV10-7181-DDP (SSx)

Leroy French, Sr. v. Wal-Mart Stores, Inc., Iconix Brand Group Inc. and  
Studio Ray, LLC  
U.S. District Court, District of South Carolina, Beaufort Division  
Case # 9:11-CV-02738-CWH

Oceans of Images Photography, Inc. v. Foster and Smith, Inc.  
U.S. District Court, Middle District of Florida, Tampa Division  
Case # 8:11-CV-01160-JSM-AEP

Karol Western Corp. v. Smith News Company, Inc.  
US District Court, Central District of California  
Case # CV12-7695 ODW (VBKx)

Jim Marshall Photography LLC v. John Varvatos Enterprises, Inc.  
US District Court, Northern District of California  
Case # CV 11 6702 DMR

Andrew Paul Leonard v. Stemtech Health Sciences, Inc.  
US District Court, District of Delaware  
Case # 08-67-LPS-CJB Consolidated

G. Mitchell Davis v. Tampa Bay Arena, Ltd

US District Court, Middle District of Florida, Tampa Division

Case # 8:12-cv-60-T-30MAP

Nouveau Model & Talent Management v. JAKKS Pacific, Inc.

Superior Court of the State of California, County of Los Angeles

Case # SC111112

My publication list is included in my curriculum vitae, a copy of which is attached to this Report as Exhibit A.

## **II. COMPENSATION**

My work on this matter is being billed at my standard rate of \$650.00 per hour. If my client elects to pay my fees in advance or within ten days of my invoice date, I offer 5% net 10 payment terms, excluding deposition and courtroom testimony. Other than my current engagement as an expert in this matter, I have had no relationships with the parties to this matter. My compensation is not contingent upon, dependent upon or related in any way to the outcome of this matter.

## **III. MATERIALS CONSIDERED**

In preparation for this Report and for the expert testimony that I may be called on to provide, I have considered the materials listed in Exhibit H.

#### **IV. BACKGROUND**

Karol Western Corporation, founded in 1959, is a California corporation engaged primarily in designing and wholesaling gift and souvenir merchandise.<sup>2</sup>

Smith News Company, Inc, d/b/a Smith Novelty Company, founded in 1955, is a California corporation engaged primarily in distribution of postcards, printed materials, souvenirs and gift items.<sup>3</sup>

In August 2009, Karol created an ornamental design picturing a stylized, abstract representation of the Las Vegas sign for application to flasks and other souvenir products.<sup>4</sup> Karol arranged for contract production of the flasks and in September 2009 commenced distribution and sale of the flasks in the Las Vegas area.<sup>5</sup> Karol continues to distribute and sell the flasks today.<sup>6</sup>

In late 2011 or early 2012, Smith commenced distribution in the Las Vegas market of flasks and other souvenir products bearing an ornamental design picturing a stylized, abstract representation of the Las Vegas sign.<sup>7</sup> The artwork for the particular design used on the Smith flasks was prepared by Smith in November 2011.<sup>8</sup> Smith continues to distribute and sell the flasks today.<sup>9</sup>

In the first quarter of 2012, Karol learned of the distribution of the Smith flasks described in the preceding paragraph,<sup>10</sup> and in August, 2012 Karol filed the complaint in the instant matter, alleging, among other claims, that the

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<sup>2</sup> Declaration of Anthony Zoss, filed March 12, 2013 ("Zoss Declaration") 1:9

<sup>3</sup> Declaration of Ken Glaser, Jr. in support of Defendant's Opposition to Plaintiff's Motion for Partial Summary Judgment, filed March 26, 2013 ("Glaser Declaration"), 1:5

<sup>4</sup> Zoss Declaration, 1:24

<sup>5</sup> Zoss Declaration, 4:14

<sup>6</sup> Zoss Declaration, 3:3

<sup>7</sup> Defendant's Response to Plaintiff's First Set of Interrogatories, 4:12

<sup>8</sup> Urbitzondo Declaration, 2:22

<sup>9</sup> Zoss Declaration, 4:4, also see products offered on Smith's Website at [www.smithnovelty.com](http://www.smithnovelty.com)

<sup>10</sup> Zoss Declaration, 3:12

flask design offered by Smith is substantially similar to the flask design offered by Karol.<sup>11</sup>

## **V. DISCUSSION**

### **A. Preparation**

Before forming any opinions in this matter, I contacted Karol's counsel and requested physical examples of the flasks offered by Karol and by Smith. Karol's counsel fulfilled my request on February 28, 2013, visiting my Pasadena office to personally deliver two flasks. Karol's counsel identified one Flask as an example of a flask sold by Karol commencing in 2009 ("Flask 'A' ").<sup>12</sup> Karol's counsel identified one Flask as a flask sold by Smith commencing in 2011 ("Flask 'B' ").<sup>13</sup> Flasks "A" and "B" are pictured in illustration 1 below.

Illustration 1



<sup>11</sup> Complaint of Plaintiff Karol Western Corp, dated August 23, 2012

<sup>12</sup> See Exhibit B, Comparison - Design

<sup>13</sup> See Exhibit B, Comparison - Design

For the purposes of this Report, I have relied upon the veracity of such identification by Karol's counsel. I personally conducted a visual examination of each flask under controlled conditions, viewing the flasks in a daylight-balanced viewing booth.<sup>14</sup> I have also examined and compared printed reproductions of the flasks and the incorporated designs. Karol's counsel also provided me with additional samples of flasks sold by Karol, Smith, and others. My opinions are based on my examination of both the physical three dimensional flasks (Flask "A" and Flask "B") and of the two dimensional designs as isolated from the flasks (Flask "A" and Flask "B").

To prepare reference photographs for attachment to this Report (Exhibits B, C, D, E, G) the flasks were each photographed under natural lighting, using identical lighting, lens and exposure for each flask. The photographs were then cropped and resized for reproduction in the attached exhibits. For reference purposes, text and "call-out" lines have been added to the exhibits. The photographs are unretouched, with no adjustments for color or contrast.

In addition to the flasks, I received and reviewed a copy of the Urbitzondo Declaration and other documents listed as "Materials Considered" herein. The results of my review, examination and comparison are set forth herein below.

## **B. Analysis of Flasks**

### **1. Underlying Flask - Physical Properties**

Karol has not requested an analysis of the flasks underlying the design at issue in this matter. The flasks underlying the design

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<sup>14</sup> GretagMacbeth (X-Rite) Judge II-S Viewing Booth

are manufactured from materials including metal and possibly plastic, and are nearly identical. I have been advised by Karol's counsel that Flask "A" is stainless steel. Flask "B" also appears to be stainless steel. A summary of relevant physical dimensions of Flasks "A" and "B" is set forth below.

Dimensions of Flasks	Flask "A"	Flask "B"
Circumference	21.8 cm	21.7 cm
Width, Measured Across Bottom	9.5 cm	9.5 cm
Depth of Flask	2.3 cm	2.3 cm
Height, Body	8.5 cm	8.3 cm
Height, Cap	.13 cm	.12 cm
Gap Between Cap Bottom and Top of Flask Body	.25 cm	.40 cm
Height, with Cap	9.9 cm	9.9 cm
Diameter of Cap	2.18 cm	2.18 cm

## 2. Cover Material

The bodies of Flasks "A" and "B" are covered in a material commonly known as "glitter fabric."<sup>15</sup> The glitter fabric applied to Flasks "A" and "B" is a purple or "grape" colored speckled material of identical or near-identical design and color. The material appears to be glued or otherwise adhered to Flasks "A" and "B" with a vertical seam appearing on the side of the flasks opposite the graphic design. See Exhibit C and Exhibit G for comparisons of the glitter fabric covering Flasks "A" and "B".

## 3. Application of the Graphic Designs

Flasks "A" and "B" include a graphic design appearing only on the convex side. The reverse, concave sides of Flasks "A" and "B" include a vertical seam in the glitter fabric, and no graphic design. The graphic designs appearing on Flasks "A" and "B"

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<sup>15</sup> See Exhibit B, Comparison – Design, Item "I"

incorporate graphics and text. The designs were applied to the background material using a die-cut method rather than a laser cutting method or printing method.<sup>16</sup>

The laser cutting method employs a focused beam of light to burn through materials. The printing method employs the application of ink, paint or any marking substance to apply a design to an object or material. In die-cutting, a die (typically made from metal) with sharp edges is pressed into material to cut it. As a result of the die-cutting process, the graphics and text appearing in the graphic designs for Flask "A" and "B" were cut out and removed from the purple wrapping material, leaving the reflective metal material visible where the material was removed. Although the reflective metal is behind the material, the die cut process produces the visual appearance of a silver reflective graphic design on a background of speckled purple. The die cut, in combination with the glitter fabric, creates depth in the flask design, providing a three dimensional appearance. If the viewer is positioned in front of lights, a window, or a brightly lit area, the die cut creates the illusion of an illuminated Las Vegas sign, due to the reflection of the lighting or brightly lit area in the highly reflective polished stainless steel exposed within the die cut design. The reflective illumination and three dimensional appearance are key features of Flask "A" and Flask "B". See a comparison of the die cuts, Exhibit D, and a comparison of the reflective metal, Exhibit E.

#### 4. Graphic Designs

Flasks "A" and "B" both include a graphic design positioned at the approximate center of the convex side of the flask on which

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<sup>16</sup> See Exhibit D, Comparison – Die Cut

the graphic design appears. The graphic design on Flasks "A" and "B" incorporates a horizontally oriented diamond shaped outline comprised of a solid line<sup>17</sup> and a dotted line.<sup>18</sup> On both Flasks "A" and "B", the solid line and dotted line incorporate gaps and are not contiguous. The words "LAS VEGAS" appear in upper case lettering at the approximate center of the diamond shaped outline on both Flasks "A" and "B".<sup>19</sup> The word "WELCOME"<sup>20</sup> appears near the top of the diamond shaped outline on both Flasks "A" and "B", with a circle surrounding each letter.<sup>21</sup> A four pointed star shaped graphic<sup>22</sup> appears over the left portion of the word "WELCOME" on Flasks "A" and "B", with small triangular shapes positioned as accents between each of the four points. On Flask "B" only, a three-sided box, formed by a solid line, partially surrounds the star graphic.<sup>23</sup> On Flask "B" only, the words "LAS VEGAS" <sup>24</sup> appear below the diamond shaped graphic in addition to the aforementioned appearance of the words "LAS VEGAS" within the boundaries of the diamond shaped graphic.

My examination found minor variations in the size of various elements of the graphic design. I provide approximate measurements below:

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<sup>17</sup> See Exhibit B, Comparison – Design, Item E

<sup>18</sup> See Exhibit B, Comparison – Design, Item D

<sup>19</sup> See Exhibit B, Comparison – Design, Item F

<sup>20</sup> See Exhibit B, Comparison – Design, Item G

<sup>21</sup> See Exhibit B, Comparison – Design, Item C

<sup>22</sup> See Exhibit B, Comparison – Design, Item A

<sup>23</sup> See Exhibit B, Comparison – Design, Flask B

<sup>24</sup> See Exhibit B, Comparison – Design, Flask B

Dimensions of Graphic Design Elements	Flask "A"	Flask "B"
Width of diamond portion of graphic design	8.5 cm	7.3 cm
Height of diamond portion of graphic design	5.6 cm	5.3 cm
Width of line at border of diamond	.25 cm	.1 cm
Diameter of dots at border of diamond	.2 cm	.1 cm
Height of "LAS VEGAS" text within diamond	.7 cm	.6 cm
Height of "WELCOME" text	.4 cm	.3 cm
Outer diameter of circles enclosing "WELCOME"	1 cm	.7 cm
Height of "LAS VEGAS" text beneath diamond	NA	2.3 cm
Width of "LAS VEGAS" text beneath diamond	NA	7.6 cm

### C. "Welcome to Fabulous Las Vegas Nevada" Sign

I have examined a sign located in Las Vegas, commonly known as the "Welcome to Fabulous Las Vegas Nevada" sign ("Actual Las Vegas Sign").<sup>25</sup> Created in 1959, the Actual Las Vegas Sign is listed in the National Register for Historic Places.<sup>26</sup>

The Actual Las Vegas Sign is diamond shaped, oriented horizontally, with each letter of the word "WELCOME" surrounded by a circle, and with the words "To Fabulous Las Vegas Nevada" appearing within the diamond shape. An eight pointed star appears above the top left portion of the word "Welcome." A yellow border appears around the perimeter of the diamond shape. The outside edge of the yellow border is lined with yellow light bulbs.

The design of Flasks "A" and "B" refer to, as subject matter or idea, the Actual Las Vegas Sign.

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<sup>25</sup> Located in Las Vegas, Nevada, at 5100 Las Vegas Boulevard. See Exhibit F, reference photograph of "Welcome to Fabulous Las Vegas" sign. Author: Pobrien301

<sup>26</sup> National Register for Historic Places, record #09000284

#### **D. The Urbiztondo Declaration**

Enrico Urbiztondo has been employed by Smith as a graphic artist since March, 1999.<sup>27</sup> As described by Urbiztondo, his duties as graphic artist for Smith include preparation of designs for souvenir items such as mugs, cups, tumblers, ash trays, key chains and flasks, each typically representing a locale.<sup>28</sup>

In 2004, Urbiztondo prepared a graphic image picturing the Las Vegas sign, for use on Smith products.<sup>29</sup> Urbiztondo testified that he based the 2004 graphic image of the Las Vegas sign on a photograph of the actual Las Vegas sign.<sup>30</sup>

Urbiztondo testified that after preparing the 2004 artwork picturing the Las Vegas sign, he prepared artwork for a number of Smith products also picturing a representation of the Las Vegas sign, and that all such Smith products picturing representations of the Las Vegas sign are based on Urbiztondo's 2004 artwork.<sup>31</sup> See illustration 2 below, picturing the 2004 Smith design and several Smith product designs alleged by Urbiztondo to employ that design.

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<sup>27</sup> Urbiztondo Declaration, 1:1

<sup>28</sup> Urbiztondo Declaration, 1:4

<sup>29</sup> Urbiztondo Declaration, 1:9

<sup>30</sup> Urbiztondo Declaration, 1:10

<sup>31</sup> Urbiztondo Declaration, 2:6

Illustration 2



Smith's 2004 design and various Smith product designs

I respectfully disagree with Urbitzondo's assertions. While each such product design prepared by Urbitzondo includes a depiction of the Las Vegas sign, the sign image is one of several elements of a greater design, collectively comprising a work of authorship. The selection of material, color, contrast, size, shape and placement of each element, individually and in juxtaposition, are actions of authorship. Importantly, the products underlying these designs are not mere passive substrates, but are vital elements of the design, in that the material, color, reflective properties, shape, texture and other properties of the products visually interact with and merge with the elements of the design, and together, the design and product comprise a distinct creative work. For example, in Flasks A and B, the polished, highly reflective aluminum surface of the underlying flasks is a key

design element, providing both color and reflective properties. Other elements, such as the glitter fabric and the shape of the flask are also key design elements. Each of the designs prepared by Smith and submitted as examples in his declaration (for example, the baby bib, the mug, and shot glass), necessarily rely on and incorporate the underlying properties of the products on which they are placed. I submit that contrary to Urbitzondo's assertions, the design of Karol's Flask "A" relies on and incorporates all of the elements of the stylized sign image and the flask, from the surface of the flask, to the glitter fabric, to the colors featured.

In 2011, Urbitzondo prepared artwork picturing a representation of the Las Vegas sign for use on Flask "B" (among other Smith products), wrapped in purple glitter fabric, using a die cut process to impart the design into the product.<sup>32</sup> At the time that Urbitzondo prepared the design for Flask "B," Karol had been distributing and selling Flask "A" in the Las Vegas marketplace for more than one year.<sup>33</sup>

Urbitzondo claims that he based the design for Flask "B" on the graphic image of the Las Vegas sign previously prepared by Urbitzondo in 2004.<sup>34</sup> Urbitzondo further claims that he first viewed Karol's Flask "A" in March 2013, and that Smith's 2011 Flask "B" design is not based on Karol's 2009 Flask "A" design.<sup>35</sup>

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<sup>32</sup> Urbitzondo Declaration, 2:22

<sup>33</sup> Zoss Declaration, 4:14

<sup>34</sup> Urbitzondo Declaration, 4:10, 5:6

<sup>35</sup> Urbitzondo Declaration, 5:3, 4:10

Illustration 3



Smith's 2011 Flask "B" bears far more resemblance to Karol's 2009 Flask "A" than to Urbitzondo's 2004 design. See comparison, Illustration 3. The striking similarity of Flasks "A" and "B" belies Urbitzondo's claims and any notion of independent creation. The only significant difference between the two designs is the large, secondary "LAS VEGAS" element at the base of the Flask "B" design.

Urbitzondo testified that when he is directed by his employer to create a product design, he is told (a) the product type, and (b) the process by which the design will be applied to the product.<sup>36</sup> Urbitzondo's testimony omitted any reference to the other direction received by Urbitzondo from his employer when creating designs for new products. For example, Urbitzondo did not disclose what direction, if any, he receives from his employer or supervisor as to the color, texture, theme, concept, layout, subject matter, locale or other aspects of Smith's product designs.

While Urbitzondo has testified that he did not see the 2011 Karol Flask "A" until March 2013,<sup>37</sup> his employer Smith has admitted that Smith

<sup>36</sup> Urbitzondo Declaration, 1:18

<sup>37</sup> Urbitzondo Declaration, 5:3

President Ken Glaser and Vice President Brett Rankin both viewed Karol's 2009 Flask "A" before Smith's first sale of Smith's 2011 Flask "B".<sup>38</sup>

As of this writing I have not seen testimony from Smith as to the full scope of the direction given to Urbitzondo by Mr. Glaser and Mr. Rankin in the development of the 2011 Smith Flask "B", nor have I seen testimony as to whether that direction was communicated to Urbitzondo before or after Mr. Glaser and Mr. Smith first viewed the 2009 Karol Flask "A". I may amend my report once that information comes to light.

## **VI. CONCLUSION**

After examining and comparing Flask "A", Flask "B" and the Actual Las Vegas Sign<sup>39</sup>, I conclude, based on my personal knowledge and experience and with a reasonable degree of certainty that:

- A. The subject matter or idea of Flasks "A" and "B" is identical.
- B. The abstract sign element appearing on Flasks "A" and "B" is an interpretation of, and visual reference to, the Actual Las Vegas Sign.
- C. Both Flasks "A" and "B" feature the abstract sign element centered on the convex side of the flask.
- D. Flasks "A" and "B" both omit the words "To," "Fabulous" and "Nevada," which exist on the Actual Las Vegas Sign.
- E. The stainless steel flasks underlying the glitter fabric on Flasks "A" and "B" are nearly identical.
- F. The polished stainless steel surface underlying the die cut design on Flasks "A" and "B" is identical.

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<sup>38</sup> Defendant's Response to Plaintiff's First Set of Interrogatories, 5:5, 5:16

<sup>39</sup> See Exhibits "B" through "G."

- G. The purple glitter fabric adhered to Flasks "A" and "B", which creates a solid color field for the overall design, is a prominent aspect of the product design, and is identical or near identical in appearance.
- H. The glitter fabric is adhered to Flasks "A" and "B" in the same manner, with the seam in the same location.
- I. The die-cut method used to incorporate the abstract sign element into the glitter material covering Flasks "A" and "B" is a prominent aspect of the product design, and is identical.
- J. The reflective effect of the die cut in the material adhered to Flasks "A" and "B" creates a three-dimensional, illuminated sign appearance which is a prominent aspect of the product design, and is identical.
- K. The positioning, selection, arrangement, integration and combination of the graphic elements comprising the abstract sign element on Flasks "A" and "B" employ similar scale.
- L. The positioning, selection, arrangement, integration and combination of the graphic elements comprising the abstract sign element on Flasks "A" and "B" is a prominent aspect of the product design, and is strikingly similar.
- M. Under this extrinsic analysis, the overall positioning, selection, arrangement, integration, layout and combination of all elements identified in conclusions "a" through "l" above, makes the overall design of Flasks "A" and "B" nearly identical in appearance and strikingly similar.
- N. The differences between Flasks "A" and "B" are trivial or de minimis in nature:
  1. Slightly different scale of the diamond shape.
  2. Slightly different thickness of the line graphics and of the diameter of the dots surrounding the diamond, with slightly different line breaks.

3. Slightly different typefaces used in the text appearing on the sign.
4. Slightly different star shapes, with the star on Flask "B" enclosed in a three sided box.
5. The addition of the words "Las Vegas" below the sign graphic on Flask "B", not appearing on Flask "A".

O. None of Urbiztondo's statements establish a foundation for a determination of independent creation of the Flask "B" design by Smith.

Flasks "A" and "B" are substantially and, indeed, strikingly similar, with the positioning, selection, arrangement, integration, layout and combination of all key elements (the Flask body, the glitter fabric texture, the glitter fabric color, the sign graphic, the die cut, the reflections resulting from the die cut) being nearly identical. Any differences between Flask "A" and Flask "B" are minor variations and have no bearing on my conclusion that the two flasks remain substantially and, indeed, strikingly similar.

I understand that Smith may offer expert testimony to support Smith's claims in this matter, and I expect that additional information and documents will come to light. If requested by Karol, I may offer supplementary reports and/or rebuttal testimony to the opinions expressed by Smith and Smith's experts, in accordance with the Court's scheduling order.

Respectfully Submitted,



— September 23, 2013

**Index to Exhibits**

- A**      Jeff Sedlik Curriculum Vitae
- B**      Comparison - Design
- C**      Comparison - Glitter Fabric
- D**      Comparison - Die Cut
- E**      Comparison - Reflective Metal
- F**      Welcome to Las Vegas Sign
- G**      Comparison - Fabric Color
- H**      Materials Considered

**Exhibit A**

**PROFESSOR JEFF SEDLIK**

2797 E. Foothill Blvd., Suite 120, Pasadena, CA 91107 USA

phone 626 808 0000

email: [expert@sedlik.com](mailto:expert@sedlik.com)

**Curriculum Vitae**

Professional photographer, educator, publisher, forensic analyst and consultant. Past National President of the Advertising Photographers of America (APA), the leading trade association in the commercial photography industry. Currently serves as President & CEO of the PLUS Coalition, the international photography industry licensing metadata standards body. Also serves as APA's Chief Advisor on Licensing and Copyright. 2005 Photography Industry Leadership Award, International Photography Council. 2006 Photography Person of the Year, Photo Media Magazine. 2007 Industry Leadership Award, Advertising Photographers of America.

Advises clients on photographic business practices, copyright and contract issues, valuation of photography and photographs, right of publicity/privacy issues, photographic history, digital and traditional photographic techniques, and forensic photographic analysis. Provides expert witness and consulting services on these and other matters related to photography. Professor of Photography, accomplished and experienced educator, conducts advanced seminars and workshops for professionals, and teaches college-level courses at the Art Center College of Design.

**Professional Experience**

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**President & CEO, Sedlik Photography/Sedlik Productions, 1986 – Present**

Current President & CEO of leading commercial photography and film production company. Producer, Director, Photographer, and Director of Photography, creating photography, film and video productions for advertising agencies, graphic design studios, the entertainment industry, and other clients. Operates SedlikStock, a subsidiary dedicated to licensing existing Sedlik images for advertising, editorial and merchandizing usage via affiliates including stock photography agencies and publishers. Maintains relationships with major photography industry manufacturers, testing and demonstrating analog and digital equipment and software.

**Partial Client List**

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**Clients:** 3m, 20th Century Fox, A&E Television Network, ABR Information Services, Alpo, AmSouth Bank, Andazia, Inc, Arista Records, Association of Tennis Professionals, AT&T, Avery Dennison, Bank of America, Barrington Music Products, BBC, Blue Cross, BMG/RCA Records, Bristol Myers Squibb, Buena Vista Pictures, Bureau of Census, CareAmerica, Chesebrough-Ponds, CBS/Sony Music, Cedars Sinai, Century 21, Cherokee, Columbia Pictures, Computer Associates, Concord Records, Conroy's Florist, Direct TV, Disney, Doubleday, Dreyfus, Epson, Essilor, Farmer's Insurance, Federal Express, Fitzgerald-Hartley Co., Ford, Gannon/Hartley, Geffen Records, Georgia Pacific, Great Performances, Great Western Bank, GRP Records, GTE, Guinness Museum, Hanna-Barbera, Harcourt Publishers, Hopper Papers, Ikea, Infiniti Automobiles, Island Records, Janssen Pharmaceuticals, JVC Musical Industries, Kraft Food Products, Korg, Inc., LaFace Records, Laura Ashley,

Levi Strauss, Mark Taper Forum, Missouri Historical Society, MCA Records, MCA International, Metro Goldwyn Mayer, Microsoft, Motion Picture & TV Fund, Movieland, MSN, MTM Entertainment, MTV Networks, Navisite, NBC Television, Neenah Paper, Nestle', New World Pictures, Nike, Pacific Bell, Palm Press, Paramount Pictures, Phillip Morris, Polygram Records, Pomegranate Books, Potlatch, Prentice-Hall, San Diego Zoo, Schering Plough, SBC, Signature Eyewear, Smithsonian Institution, Sony Inc., Southern Natural Gas, Spanish Tourism Office, Sugar Hill Records, Taco Bell, Telarc International, Toyota, Turner Broadcasting, U. C. Press, United Airlines, United Way, Universal Studios, VH-1, Warner Brothers Records, Web TV, Windham Hill Records, Word Records, World Savings, Yamaha, Zellerbach, Ziff-Davis, Zildjian

**Advertising Agencies & Design Firms:** Alan Sekuler & Associates, Asher Gould, BBDO, Bozell, Brierley & Partners, Brooks-Gruman Advertising, Campbell, Mithun, Esty, Cline, Davis, & Mann, Cross & Associates Design, Dailey & Associates, Davis, Elen, Daymark, DDB Needham, Worldwide, Deutsch, Douglas Oliver Design, DVC Marketing, DZN, The Design Group, East/West Network, Fitzgerald & Associates, FKQ Advertising, FP Horak Advertising, Foote, Cone, & Belding, GBF Ayer, Goodby Silverstein, Grey Advertising, Hill & Knowlton, Huerta Design, Ikkanda Design, Interbrand, J. Walter Thompson, Kang & Lee, Kaufman/Stewart, Ketchum Advertising, Klemtnar Advertising, Kovel Kresser, Kuester Group, Lehman Millet, Inc, Lintas Campbell Ewald, Mangos, Mediatrix, Melia Design Group, Ogilvy & Mather, OZ Advertising, Phillips Ramsey, Poppe-Tyson, Potter Katz & Partners, John Ryan Company, Saatchi & Saatchi, Seineger Advertising, Slaughter Hanson, SmithKlein Beecham, Strike Group, Team One Advertising, Team Creatif, Torre Lazur, Tracy-Locke, Tribe Design, Vrontikis Design, White Rhino Advertising, Young & Rubicam

**Editorial:** American Film, Arts & Entertainment, CD Review, Cosmopolitan, Details, Downbeat, Elle, Entertainment Weekly, Glamour, GuestInformant, Imperial Press, In Focus, Interiors & Sources, Jazziz, Jazz Times, Life, Los Angeles, Los Angeles Times Magazine, Mirabella, Music Connection, Newsweek, Photo District News, People, Premiere, Pulse, Q Magazine, Rolling Stone, Select, Spin, Time-Life

### **Other Professional Experience**

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**IPTC Photo Metadata Working Group**, 2006-Present: Active participant in the International Press Telecommunications Council (IPTC) standards body. Member of the IPTC Photo Metadata Working Group, charged with establishing and maintaining standards for embedded metadata in digital photographs. Co-authored the IPTC Photo Metadata White Paper 2007.

**President & CEO, Mason Editions**, 1994-Present: Operates Mason Editions, a publishing company specializing in high quality lithographic reproductions of photographs.

**Consultant and Expert Witness**, 2000-Present: Provide consulting services, forensic analysis and expert testimony on legal, business and technical matters related to digital and traditional photography.

**Adobe Photographer's Council**, 2004-Present: Advises Adobe Systems on matters related to Adobe products and services, including digital photography technologies, stock photography, and industry standards. Provides pre-release

testing services to Adobe on the Adobe Photoshop, Bridge, Stock Photo, and Creative Suite products.

**Advisory Board Member, WorkbookStock, 2000-2006:** Serve on the advisory board of WorkbookStock, a leading stock photography agency. Consult on the development of a vendor contract, copyright registration procedures, and web interface.

**Advisory Board Member, Exactly Vertical, 1998-2000:** Served on the advisory board of Exactly Vertical, a company offering interactive business management solutions for photographers. Consulted on issues including web interface, software design, copyright registration, merchandizing, stock licensing, photographers' work flow, and branding.

**Founder, Digital Technology Advisory Council, 2002:** Founded an Advisory Council comprised of high level representatives from each of the leading photography industry manufacturers.

**Universal Photographic Digital Imaging Guidelines (UPDIG), 2004-Present:** Active participant in working group charged with developing worldwide standards in the commercial application of digital imaging technologies. Participant in Model Release Working Group, charged with developing international standards for model releases and model release workflow.

**United States Copyright Office:** Alpha test consultant for online electronic copyright registration system (ECO). Advised copyright office on copyright registration workflow issues.

**Beijing Intellectual Property Expertise Center of Judicature (JZSC), 2007-Present:** Advisor to Chinese governmental agency and the People's Court of China on intellectual property issues in China.

**ASMP Professional Business Practices in Photography, 2008:** Contributing author.

## **Awards & Recognition**

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**APA Photography Industry Leadership Award, 2007**

**Photography Person of the Year, 2006**

An award presented in 2006 by Photo Media Magazine

**ICP Photography Industry Leadership Award, 2005**

An award presented in May 2005 by the International Photography Council, a non-governmental organization of the United Nations.

**Mamiya Award of Excellence in Photo Education, 1999**

Recognized as a leading arts educator. Selected from all college-level photography instructors, nationwide.

**Print's Regional Design Annual: Award of Excellence, 1999**

**Ozzie Awards: Silver Ozzie for Best Photography, 1999**

**Art Directors Club: Excellence in Photography, 1999**

**Art Directors Club: Excellence in Photography, 1999**

**The Clio Awards: Silver Clio, Director of Photography, Rich Media Advertising, 1999**

**PDN/Nikon Award of Excellence in Self Promotion, 1998**

**Advertising Photographers of America: Best In Show, 1998**

**Communication Arts Award of Excellence in Editorial Photography, 1998**

**The One Show Award for Excellence in Advertising, 1997**

**Communication Arts Award of Excellence, Unpublished Work, 1997**

**Communication Arts Award of Excellence in Self Promotion, 1996**

**Communication Arts Award of Excellence in Advertising Photography, 1994**

**Communication Arts Award of Excellence, Book Series, 1993**

**Art Direction Magazine Creativity Award, 1992**

**Communication Arts Award of Excellence in Editorial Photography, 1992**

**Communication Arts Award of Excellence in Advertising Photography, 1991**

**Communication Arts Award of Excellence in Editorial Photography, 1990**

**Art Direction Magazine: Creativity Award, 1990**

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## **Articles Authored**

### **Photo District News**

Contributor to Photo District News, the photography industry's primary trade publication. Authored the "Ask The Expert" column, writing on subjects of business management, licensing, copyright, and creativity.

### **In Focus**

Contributor to In Focus Magazine, the magazine of the Advertising Photographers of America, writing on subjects including business management, industry trends, protecting the value of photography, licensing, copyright, creativity.

### **Wraparound**

Regular Contributor to Wraparound Magazine, writing on legal and business topics.

### **APA/LA NewsMagazine**

Contributor to the news magazine published by the Advertising Photographers of America, Los Angeles Chapter.

### **Photo Media**

"Get Down to Business" Fall, 2000

**IPTC Photo Metadata White Paper 2007**  
Co-author.

**Articles on Jeff Sedlik, Sedlik Photography & Mason Editions**

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**Jazziz Magazine**  
"The Jazz Image" January 1993

**Jazziz Magazine**  
"Focus on Sedlik" January 1994

**Photographic**  
"Jeff Sedlik" May 1995

**Computing News**  
"Get Your Company on the Internet" June 26, 1998

**Success**  
"The Jazz and Blues Masters" September 9, 1998

**PC Computing**  
"Set Up Shop on the Internet in 60 Minutes or Less" September 1998

**APA NewsMagazine**  
"Jeff Sedlik" December 1998, Volume 20, No. 4

**Entrepreneur's Home Office**  
"Jeff Sedlik: Sharp Shooter" December 1998, Volume 1, No. 6

**APA News In Focus**  
"An Interview with Photographer Jeff Sedlik" January 1999, Volume 8, No. 1

**Studio Photography and Design**  
"Commercial Success: The Conceptual Photography of Jeff Sedlik" April 1999,  
Volume 2, Issue 4

**PC World**  
"The Web and Your Business: Setting Up Shop Online" May 1999, Volume 7, No. 5

**APA NewsMagazine**  
"The Life of a Shoot: From First Call to Final Billing" June 1999

**APA NewsMagazine**  
"Studio Tour: Jeff Sedlik" September 1999

**Photo District News**  
"Focus on Advertising: The Secret of Jeff Sedlik's Success" November 1999

**ASMP/CT News**  
"Jeff Sedlik and the Ten Specific Steps Toward Making A Living Now and In the  
Future in Photography" September 2002

**Rangefinder Magazine**

"Jeff Sedlik: Diversity" December 2005

**PhotoMedia**

"Jeff Sedlik: Navigating the Licensing Waters" June 2006

**Professional Societies**

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**Picture Licensing Universal System (PLUS)**

[www.useplus.org](http://www.useplus.org)

President & C.E.O.. Trade organization dedicated to the development and implementation of international licensing standards in the photography, illustration, publishing, advertising, and graphic design industries. Directed recruitment of trade organizations and other interested parties worldwide and supervised development and implementation of licensing standards. Ongoing.

**Advertising Photographers of America / National**

[www.apanational.org](http://www.apanational.org)

National President, 2000-2002

Chief Advisor on Licensing & Copyright, 2002- Present

Elected to top position in commercial photography by industry leaders nationwide in June, 2000. Directed and supervised all operations of the largest trade organization representing commercial photographers, leading more than seventy volunteer board members located in all areas of the country. Advised federal and state legislators, and Senior Officials at the Small Business Administration and US Copyright Office.

**American Society of Media Photographers**

[www.asmp.org](http://www.asmp.org)

Member

**American Society of Picture Professionals**

[www.aspp.org](http://www.aspp.org)

Member

**Advertising Photographers of America/Los Angeles Chapter**

Board of Directors, APA/Los Angeles Chapter, 1998- 2002

Member, 1996 - Present

Served as Board Member directing non-profit trade association representing commercial photographers in Los Angeles. Served on legal/legislative committee and events committee.

**Stock Artists Alliance**

Member

**Photography Instructors Education Association**

Member

## **Teaching Experience**

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### **Art Center College of Design, Pasadena, California**

Professor of Photography

Faculty Member, 1996 – Present

Developed and implemented classes in licensing, copyright, business standards & practices, and photography technique. Teach independent study courses and workshops. Mentor graduating students, advise on portfolio development and new business management. Active member of Intellectual Property Committee and Licensing Committee. Consulted with Business Curriculum Committee, reviewing and providing feedback on school's new business curriculum. Named "Great Teacher" by photography students and presented with Great Teacher Award, 1996. Ten Year Service award, 2007.

### **Other Teaching Experience: Workshops & Seminars**

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#### **1977 – Present**

Invited speaker/panelist at the industry's major trade shows, speaking on topics including copyright, licensing, self promotion, building an advertising photography business, stock photography and technical issues. Lectured on photography at LAUSD Community Adult School. Speak before groups of photographers and creatives nationwide. Wrote and produced the APA "Real World" seminar series on topics ranging from estimating, to licensing, to producing. Participated in the development of Digital Imaging For Photographers, a leading seminar series dedicated to cutting- edge digital techniques and equipment. Speaker at the "PDN On the Road" seminar series, on copyright, licensing and stock photography.

### **Foundation, Community Service and Charitable Work**

#### **President, Warren King Foundation, 2000 - 2002**

Created foundation providing endowed photography scholarships to promising photography students. Produced a fundraising event attended by photographers, educators, government officials and media. Lobbied Los Angeles Unified School District to re-launch abandoned arts education programs in local schools. Arranged for an arts teacher to receive a lifetime achievement award at the Kennedy Center.

#### **Boy Scouts of America, 1972-1977**

Eagle Scout

### **Other Community Service and Charitable Work**

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Conduct visiting lectures on the art and history of photography for elementary school students in the Los Angeles Unified and Pasadena Unified School Districts. Judge photography exhibitions at the high school, college, and amateur, and professional levels. Photograph pro-bono or reduced-fee public service campaigns for charitable organizations such as the LA Times "Reading by Nine" program, Jewish Family Services, Motion Picture and Television Fund, United Way, and others. Volunteered time to leadership in the Boy Scouts and public schools. Donated original photographic prints to each of the Focus On Aids annual fundraising auctions 1987-2003, Woodcraft Rangers, Pediatric Aids Foundation and other vital charitable organizations.

### **Academic**

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#### **Continuing Education, 1986-Present**

Attend workshops and seminars on business, legal and technical issues affecting photographers, with an emphasis on intellectual property, business management, stock photography, and digital technology courses. Consult with manufacturers and distributors in testing new equipment to stay abreast of the latest developments in digital imaging technologies.

**Brooks Institute, 2008, MFA, HC**

**Art Center College of Design, Pasadena, California, 1986, BFA, Photography.**

**University of California at Santa Barbara, 1980-1983, Liberal Studies major with emphasis in Art, Art History, Economics, Business Management.**

**Exhibit B**



**COMPARISON - DESIGN**



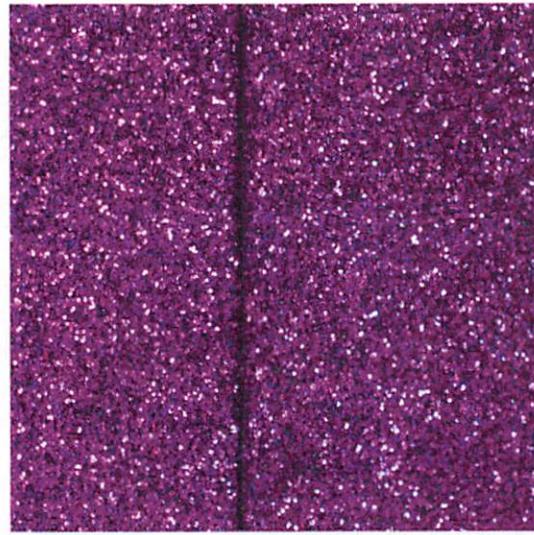
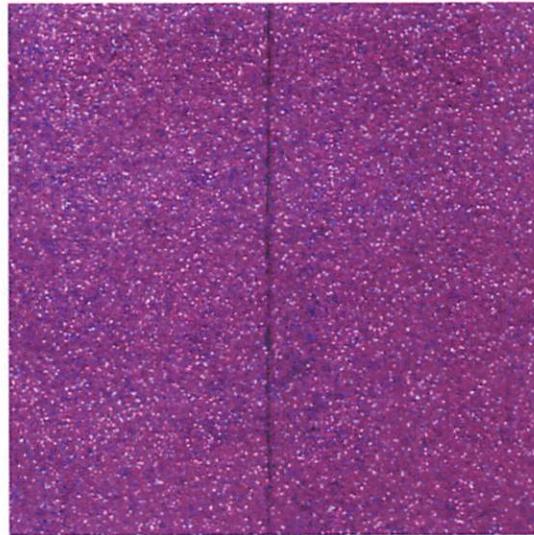
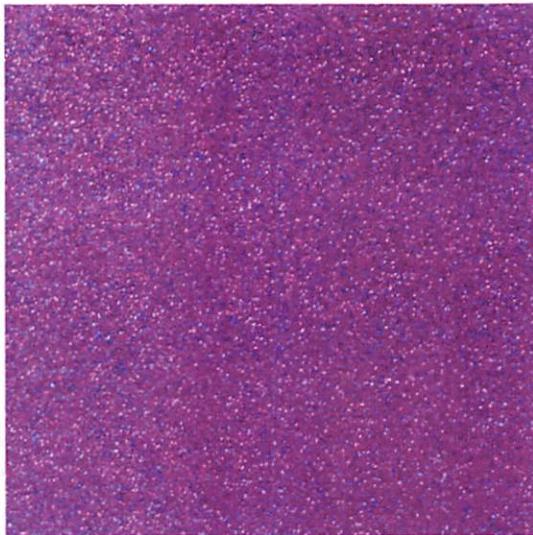
**Exhibit C**

**COMPARISON - GLITTER FABRIC**

**FLASK A**



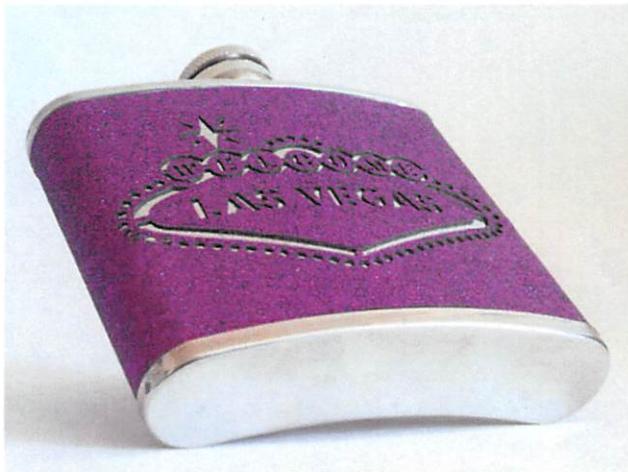
**FLASK B**



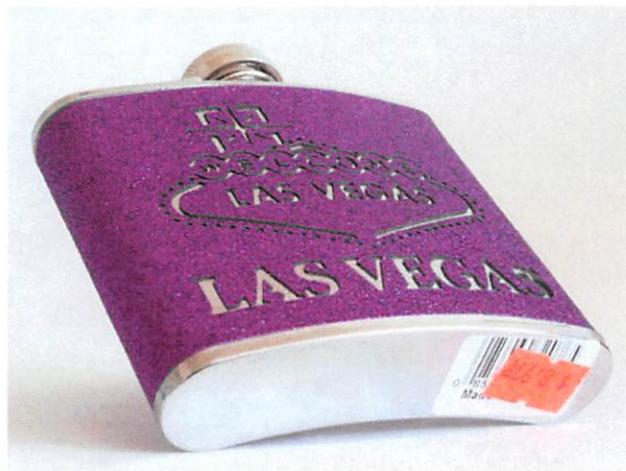
**Exhibit D**

**COMPARISON - DIE CUT**

**FLASK A**



**FLASK B**



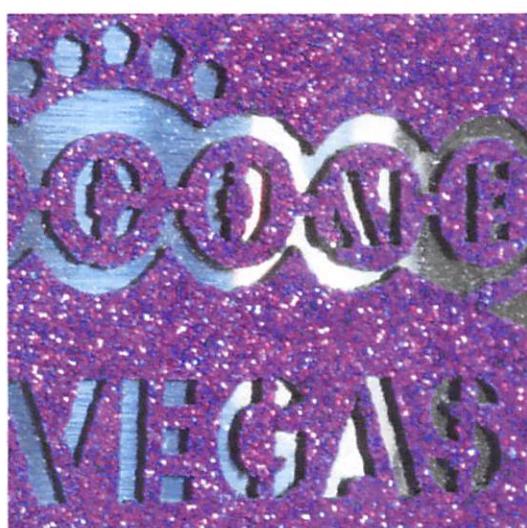
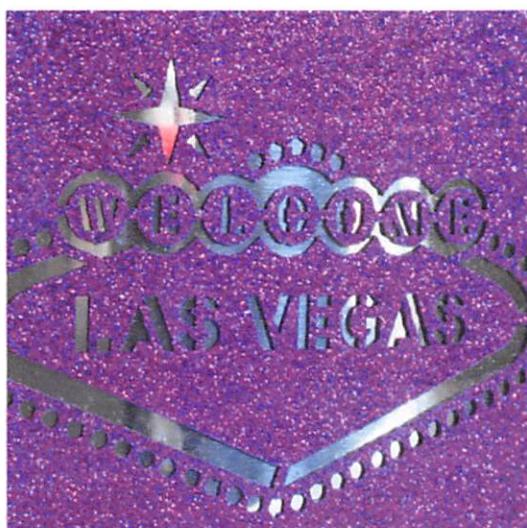
**Exhibit E**

**COMPARISON - REFLECTIVE METAL**

**FLASK A**



**FLASK B**



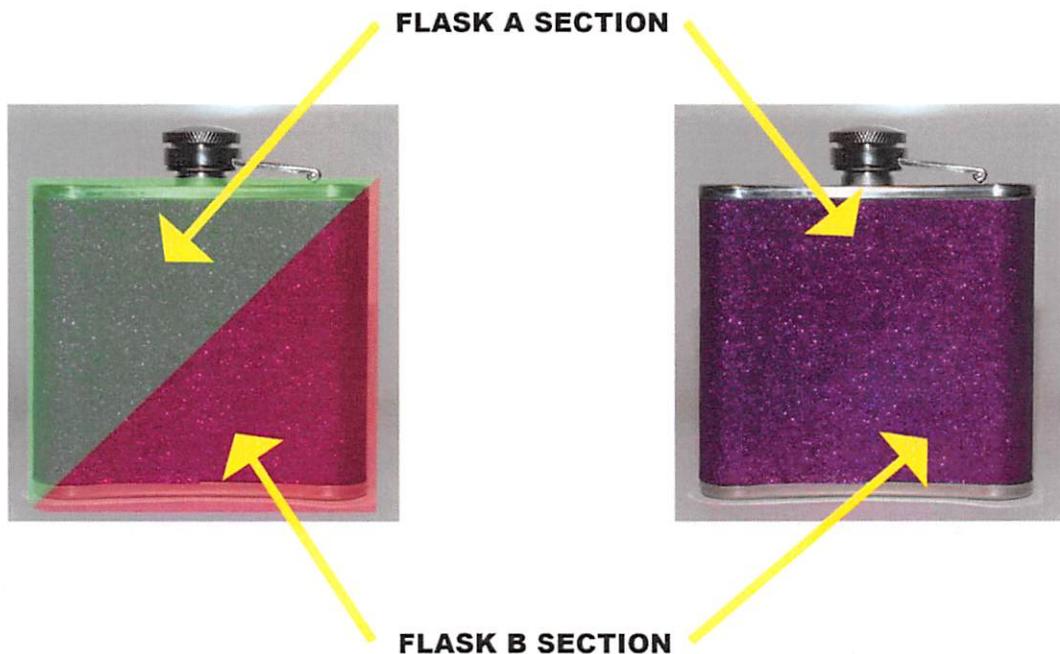
**Exhibit F**

**“WELCOME TO LAS VEGAS” SIGN**



**Exhibit G**

**COMPARIION - FABRIC COLOR**



To demonstrate the similarity of the glitter fabric covering Flask A and Flask B, we separately photographed each flask, then digitally cut the two flask photographs in half diagonally and combined the top left portion of Flask A with the bottom right portion of Flask B, butting the two halves together, resulting in the photocomposed (but otherwise unretouched) photograph at right. The photograph at left indicates the position of the Flask A photograph (green) and Flask B photograph (red) in the photocomposed flask photograph at right.

**Exhibit H**

### Materials Considered

- June 12, 2012 Letter from H. Michael Brucker to Donald J. Brunsten
- Separate Statement of Uncontroverted Facts Supporting Plaintiff Karol Western Corp.'s Motion for Partial Summary Judgment
- "Welcome to Las Vegas" sign (The Sign.png)
- Declaration of Enrico Urbiztondo In Support of Defendant's Opposition to Plaintiff's Motion for Partial Summary Judgment with Exhibits A - L
- Excerpt from Plaintiff's Reply Memorandum to Defendant's Opposition to Motion for Partial Summary Judgment (pages 5-12)
- Plaintiff Karol Western Corp.'s Opposition Memorandum of Points and Authorities to Defendant Smith News Company, Inc.'s [Cross] Motion for Summary Judgment
- First Amended Complaint of Plaintiff Karol Western Corp.
- Miscellaneous Flasks
- [www.smithnovelty.com](http://www.smithnovelty.com)
- Amended Answer to Complaint First Amended and Demand for Jury Trial
- Plaintiff's Reply Memorandum of Points and Authorities to Defendant's Opposition to Motion for Partial Summary Judgment
- Defendant's Memorandum of Points and Authorities in Support of Defendant's Opposition to Plaintiff's Motion for Partial Summary Judgment
- Declaration of Ken Glaser, Jr. in Support of Defendant's Opposition to Plaintiff's Motion for Partial Summary Judgment
- Defendant Smith News Company, Inc's Response to Plaintiff's First Set of Interrogatories
- Complaint of Plaintiff Karol Western Corp.
- Declaration of Anthony Zoss
- Excerpt from Plaintiff's Opposition Memorandum of Points and Authorities to Defendant's Motion for Summary Judgment (Pages 18-23)